1996

State of Utah v. Edward Smith : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	*	BRIEF OF APPELLANT
Plaintiff/Respondent	*	
v.	*	Case No. 970181-CA
EDWARD SMITH,	*	Priority 2
Defendant/Appellant.	*	

BRIEF OF APPELLANT

Appeal from the Conviction and Sentence Imposed
on One Count of Aggravated Robbery
after a jury trial before the Honorable
Stanton M. Taylor, Judge of the Second
Judicial District on the 5th day of
September, 1996

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JURISDICTION AND NATURE OF PROCEEDING

This appeal is from a conviction of one count of Aggravated Robbery, a first degree felony in violation of U.C.A. §76-3-302 (1953, As Amended). The Appellant was convicted of the above charge after a jury trial, the Honorable Stanton M. Taylor presiding. The appellant was tried in the Second District Court of Weber County on the 5th and 6th days of September, 1996.

On October 11, 1996, the Defendant was sentenced to serve one term of five years to life on the conviction of Aggravated Robbery. The court also enhanced the Defendant's sentence for a term of zero to five years, to be served consecutively, pursuant to U.C.A. §76-6-203. The Appellant appeals the enhanced sentence imposed pursuant to U.C.A. §76-6-203 for use of a Dangerous weapon.

Jurisdiction to hear the above entitled appeal was conferred upon the Supreme Court of Utah pursuant to U.C.A. §78-2-2(3)(I) 1953, as amended) and Rule 26 of the Utah Rules of Criminal Procedure. The Utah Supreme Court exercised its authority and poured the case over to the Utah Court of Appeals.

STATEMENT OF ISSUES ON APPEAL, STANDARD OF REVIEW & CITATIONS TO THE RECORD

POINT I

The Defendant's constitutional right to be free from Double Jeopardy was violated when the trial court imposed an enhanced sentence for using a "dangerous weapon" when using a dangerous weapon was already part of the offense for which the Appellant was convicted.

Standard of Review

Constitutional issues are a question of law. The trial court's determination of questions of law are given no deference and are reviewed by this court for correctness. State v. Thurman, 846 P.2d 1256, 1271.

Citation to the Record

The Defendant properly objected to the imposition of the enhancement on the issue of Double Jeopardy. (T. Sentencing 14-31)

POINT II

The Trial Court committed reversible error when it failed to allow a cautionary jury instruction requested by the Defendant regarding oral admissions.

Standard of Review

An appeal challenging the refusal to give a jury instruction presents a question of law for which no particular deference is granted. Ong Int'l (U.S.A.) Inc. V. 11th Avenue Corp., 850 P.2d 447, 452 (Utah 1993). An Appellate Court will review the trial court's instructions under a correction of error standard. Ames v. Maas, 846 P.2d 468, 471 (Utah App. 1993). Failure to give requested jury instructions constitutes reversible error only if their omission tends to mislead the jury to the prejudice of the complaining party or insufficiently or erroneously advises the jury on the law Biswell v. Duncan, 742 P.2d 80, 88 (Utah App. 1987).

Citation to the Record

The Defendant properly objected to the Court modifying the jury instruction. (T. Trial Vol. II, 85)

CONSTITUTIONAL PROVISIONS, STATUTES & RULES

UNITED STATES CONSTITUTION

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UTAH STATE CONSTITUTION

ARTICLE 1, SECTION 12

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusations against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

UTAH CODE ANNOTATED

Section 76-3-203
(Prior to 1995 Amendment)

A person who has been convicted of a felony may be sentenced to imprisonment for an indeterminate term as follows:

(1) In the case of a felony of the first degree, for a term at not less than five years, unless otherwise specifically provided by law, and which may be for life but if the trier of fact finds a firearm or a facsimile or the representation of a firearm was used in the commission or furtherance of the felony, the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently;

(2) In the case of a felony of the second degree, for a term at not less than one year nor more than 15 years but if the trier of fact finds a firearm or a facsimile or the representation of a firearm was used in the commission or furtherance of the felony, the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently;

Section 76-3-203
(As amended effective May 1, 1995)

A person who has been convicted of a felony may be sentenced to imprisonment for an indeterminate term as follows:

(1) In the case of a felony of the first degree, for a term at not less than five years, unless otherwise specifically provided by law, and which may be for life but if the trier of fact finds a dangerous weapon or a facsimile or the representation of a dangerous weapon, as provided in Section 76-1-601, was used in the commission or furtherance of the felony, the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently.

(2) In the case of a felony of the second degree, for a term at not less than one year nor more than 15 years but if the trier of fact finds a dangerous weapon or a facsimile or the representation of a dangerous weapon as provided in Section 76-1-601, was used in the commission or furtherance of a felony, the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently.

Section 76-6-301
(Robbery)

(1) A person commits robbery if:
   (a) the person unlawfully and intentionally takes or attempts to take personal property in the possession of another from his person, or immediate presence, against his will, by means of force or fear; or
   (b) the person intentionally or knowingly uses force or fear of immediate force against another in the course of committing a theft.

(2) An act shall be considered "in the course of committing a theft" if it occurs in an attempt to commit theft, commission of theft, or in the immediate flight after the attempt or commission.

(3) Robbery is a felony of the second degree.

Section 76-6-302
(Aggravated Robbery)

(1) A person commits aggravated robbery if in the course of committing robbery, he:
  (a) uses or threatens to use a dangerous weapon as defined in Section 76-1-601;
  (b) causes serious bodily injury upon another; or
  (c) takes an operable motor vehicle.
(2) Aggravated robbery is a first degree felony.
(3) For the purposes of this part, an act shall be considered to be "in the course of committing a robbery" if it occurs in an attempt to commit, during the commission of, or in the immediate flight after the attempt or commission of a robbery.

STATEMENT OF THE CASE

The Appellant was convicted of one count of Aggravated Robbery, a first degree felony. At trial, an investigating officer from the FBI testified that the Appellant admitted to the crime. At the close of evidence, the Appellant's trial attorney requested that the trial court give a cautionary jury instruction regarding oral admissions. The trial court struck the last sentence of the requested instruction before giving it to the jury. The jury returned a verdict of guilty, and the Appellant was sentenced to serve a term of five years to life on the charge of Aggravated Robbery.

The trial court enhanced the Appellant's sentence pursuant to U.C.A. §76-3-203 (Amended 1995). The enhancement for the use of a dangerous weapon was a direct violation of the Appellant's right against double jeopardy. The Appellant was convicted of a first degree felony rather than a second degree felony, because of his use of a dangerous weapon. The court then enhanced his sentence for the use of the same dangerous weapon. This double punishment, for the use of a dangerous weapon, was a violation of the Appellant's right against double jeopardy.

STATEMENT OF THE FACTS

On June 17, 1995 at approximately 11:45 p.m. two individuals entered the Wendy's restaurant through a back door. (T. Vol. I, pp. 14, 15, 40) One of the individuals was armed with a long rifle, and the other was armed with a pistol. (T. Vol. I, pp. 16, 21, 42, 47) At gunpoint, the employees were instructed to retrieve money from a safe and deliver it to the two suspects. The individuals then left the Wendy's. The Ogden City Police Department responded to the scene, and began an investigation into the robbery. (T. Vol. I, p 56) .

On June 25, 1997 the Federal Bureau of Investigations (hereinafter "FBI") and some local law enforcement agencies were working a "storefront" operation in Davis County. (T. Vol. I, pp 61-62) The storefront operation had no connection to the Wendy's investigation. As a result of the storefront, FBI Agent Robert Evans met the Defendant. (T. Vol. I, p. 63) At trial, the FBI agent testified that the Appellant believed the agent to be a gangster. (T. Vol. I, p. 80) On June 25, 1995, while riding with Agent Evans from Layton to Salt Lake, the Defendant allegedly told Agent Evans that he and another individual by the name of Shane Searle committed a robbery of a Wendy's restaurant. (T. Vol. I, pp. 67-69)

Agent Evans further testified that, after the Appellant's arrest on December 5, 1995, the Appellant again confessed to the robbery. (T. Vol. I, pp. 115-117) The admissions were not tape recorded, nor were they reduced to writing and signed by the Appellant. (T. Vol. I, pp 117-118)

Prior to jury deliberations, the Appellant's attorney, Martin Gravis, requested that a cautionary jury instruction regarding oral admissions be given to the jury. The trial court allowed only an edited version of the instruction to be given to the jury. The edited version did not caution the jury regarding the unreliability of oral admissions. (T. Vol. II, p. 85)

Prior to the Appellant's trial and sentencing, the legislature amended the firearm enhancement statute, U.C.A. §76-3-203(1). The amendment changed the statute to allow an enhancement of a sentence if it was found that a "dangerous weapon" was used in the commission of a felony. The prior statute allowed for an enhanced sentence only if a "firearm" had been used in the commission of a felony.

The Appellant was convicted of the Aggravated Robbery based upon his use of a "dangerous weapon" in the course of the robbery, and he was sentenced to serve a term of five years to life. The Appellant was also sentence to an enhanced term of zero to five years pursuant to U.C.A. §76-3-203 for the use of the same "dangerous weapon". (T. Sentencing, p. 30)

SUMMARY OF ARGUMENT

The trial court committed reversible error when it amended the proposed jury instruction submitted by the defense. Failure of the trial court to give the proposed instruction caused the jury to give undue weight to the oral admissions proffered by the officers. The cautionary instruction would have instructed the jury to use caution when considering an alleged oral admission.

The Appellant's right to be free from double jeopardy was violated when he was subjected to an enhanced sentence under the dangerous weapon enhancement, U.C.A. §76-2-203. The Appellant was convicted of a first degree felony rather than a second degree felony, because of his use of a "dangerous weapon". The Appellant was further penalized for the same act when his sentence was enhanced for the use of the same "dangerous weapon".

ARGUMENTS

POINT I

THE DEFENDANT'S CONSTITUTIONAL RIGHT TO BE FREE FROM DOUBLE JEOPARDY WAS VIOLATED WHEN THE TRIAL COURT IMPOSED AN ENHANCEMENT TO THE APPELLANT'S SENTENCE FOR USING A "DANGEROUS WEAPON" WHEN USING A DANGEROUS WEAPON WAS A ALREADY PART OF THE OFFENSE FOR WHICH HE WAS CONVICTED

Both the United States Constitution and the Utah State Constitution guarantee persons charged with a criminal offense the right to be free from double jeopardy. See U.S. Const. Amend. V; Utah Const. Art. 1, Section 12. The double jeopardy clause not only protects individuals against a second prosecution for the same offense, it also protects against a second punishment for the same offense. United States v. Bizzel, 921 F.2d 263 (10th cir. 1990); Grady v. Corbin, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed 548 (1990).

In the case at bar, the Defendant was subjected to a penalty enhancement pursuant to U.C.A. §76-3-203, due to his use of a dangerous weapon in the commission of a felony. The Defendant's degree of offense was already enhanced from a second degree felony robbery, U.C.A. §76-3-301, to a first degree felony aggravated robbery, U.C.A. §76-3-302, based upon the use of the same dangerous weapon. This double punishment resulted in a violation of the Appellant's right against double jeopardy.

The Supreme Court of the United States has stated that the double jeopardy clause is designed to "prevent the sentencing court from prescribing greater punishment than the legislature intended." Missouri v. Hunt, 459 U.S. 359 (1983). Therefore, for the Court to properly analyze Appellant's claim of double jeopardy, it must determine what the legislative intent was when they enacted the two provisions. Albernaz v. United States, 450 U.S. 333 (1981).

In enacting U.C.A. §76-6-203 in 1976, the legislature made its intention very clear. The Utah Supreme Court as well as the Utah Court of Appeals have held that the previous statute did not violate the double jeopardy clause, because the legislature intended a more severe sentence based upon the *specific type* of weapon used. State v. Angus, 581 P.2d 992 (Utah 1978); State v. Speer, 750 P.2d 186, 192 (Utah 1988); State v. Drawn, 791 p.2d 890, 133 Utah Adv. Rep. 24 (Ct. App. 1990); State v. Webb, 790 P.2d 65, 131 Utah Adv. Rep. 41 (Ct. App. 1990). In Angus, the Supreme Court examined the legislative intent behind the enhancement statute and found that:

> ...the legislature has further determined that the use of ***some deadly weapons*** are more dangerous than others. For instance, a pocket knife, a baseball bat, or even a pencil, in some circumstances of use, may be a deadly weapon. But the legislature has regarded the use of firearms as innately more dangerous and therefore more deserving of punishment. For this reason it has provided, by Sec. 76-3-203 quoted above, that for conviction of any felony by using a firearm there shall be the additional penalty. (Emphasis added)

It is clear that in enacting the original statute, the legislature intended the statute to apply only to those weapons that were inherently dangerous. Since the legislature intended to more severely punish those who used firearms, as opposed to other dangerous weapons, the statute was upheld.

When the Legislature amended U.C.A. §76-6-302 to include all dangerous weapons in 1995, they did not make their intentions clear. The statute passed through the Senate without debate or question. (Recordings of Senate Debate, Day 45, February 29, 1995, 51st Legislative Session, Tape 48, Count 2114) In the House of Representatives, the only comment made was that the legislature wanted to "broaden the ability of law enforcement to deal with violent crimes." (Recording of House of Representative Debate, Day 44, February 28, 1995, 51st Legislative Session, A.M. session, Tape 1, Count 2309) These statements do not clearly represent that the legislature intended to provide dual punishment for those persons convicted of aggravated offenses, especially those who already had their

sentence enhanced pursuant to other statutes. Viewing the fact that aggravated offenses are increased a degree where there is use of a dangerous weapon, it seems unlikely that the legislature would again punish those felons for use of a dangerous weapon. Were that the legislative intent, it should be clearly reflected either in the statute or in the debates.

The legislative history of the prior statute makes it clear that the intent was to severely punish those who used specific types of weapons. The Legislature felt that the use of a firearm justified additional penalties. However, in amending the statute to include all dangerous weapons, the legislature failed to make such a finding regarding dangerous weapons.

During the 1995 legislative session, little or no discussion was presented to make the legislature's intention clear. Without clear evidence to show that the legislature specifically intended to create a double punishment for person convicted of aggravated offense, the statute must be declared unconstitutional, because it violates the Double Jeopardy Clause of the United States Constitution and the Utah State Constitution.

POINT II
THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO ALLOW A CAUTIONARY JURY INSTRUCTION REQUESTED BY THE DEFENDANT REGARDING ORAL ADMISSIONS

An appeal challenging the refusal to give a jury instruction presents a question of law with no particular deference granted to the trial court's decision. Ong Int'l (U.S.A.) Inc. V. 11th Avenue Corp., 850 P.2d 447, 452 (Utah 1993). An Appellate Court will review the trial court's instructions under a correction of error standard. Ames v. Maas, 846 P.2d 468, 471 (Utah App. 1993). Failure to give requested jury instructions constitutes reversible error only if their omission tends to mislead

the jury to the prejudice of the complaining party or insufficiently or erroneously advises the jury on the law. Biswell v. Duncan, 742 P.2d 80, 88 (Uth App. 1987).

The trial court committed error when it failed to give a complete jury instruction requested by the Appellant. The Appellant requested the following instruction:

> You are the exclusive judges as to whether the defendant made an admission, and if so, whether such statement is true in whole or in part. If you should find that the defendant did not make the statement you must reject it. If you find that it is true in whole or in part, you may consider that part which you find to be true.
>
> Evidence of an oral statement of the defendant should be viewed with caution. (CALJIC 2.71, 1995)

Instead of giving the instruction as requested, the trial court struck the last, and most crucial, sentence.

The cautionary instruction requested by Appellant has been reviewed and found necessary when oral admissions are admitted in other jurisdictions. State v. Swee, 51 Or. App. 249, 624 P.2d 1198 (1981); People v. Bemis, 33 Cal. 2d 395, 202 P.2d 82 (1949); People v. Dail, 22 Cal 2d 642, 140 P.2d 828 (1943).

However, this issue has only been superficially reviewed in Utah on two occasions. See State v. Shabata, 678 P.2d 785 (Utah 1984) and State v. Hymas, 131 P.2d 791 (Utah 1942). The Shabata court acknowledged that a cautionary instruction may have been appropriate in that case, but failed to find error because the Appellant failed to provide the proposed instruction.

A "defendant is entitled to have the jury instructed on his theory of the crime if there is any basis in the evidence to support that theory." State v. Brown, 607 P.2d 261, 265 (Utah 1980), and he is entitled to a cautionary instruction so long as it is not incorrect or misleadingly states the material rule of the law. State v. Aly, 782 P.2d 549, 550 (Ct. App. 1989).

The requested instruction was an accurate statement of the law, as the Court found in Hymas. In Hymas, the Court acknowledged and upheld the jury instruction charging the jury to "receive with great caution the written and oral statements attributed to defendant because of the dangers of misstatements, misunderstandings, the infirmities of memory, etc., and the possibility of the defendant's mind being oppressed and disturbed by his position." The Court in Hymas clearly found that the proposed instruction "embraces a correct legal principle". The legal principle has not been overturned or amended, and is still a correct statement of the law.

The tendency of a witness to misstate the defendant's statements, or to misunderstand the defendant's statements and improperly convey them to the jury, require that a cautionary instruction should be given. Although the court does not have an obligation to provide an instruction without motion by a party, the trial court was required to give the instruction once it was proposed, so long as it did not misstate the law. The court's failure to advise the jury to use caution when evaluating the admission of the defendant prejudiced his case, and therefore requires reversal of the Defendant's conviction.

CONCLUSION

The Appellant was denied his right to be free of double jeopardy when he was twice sentenced for the same offense. U.C.A. §76-3-203 should be found unconstitutional as it violates the Double Jeopardy Clause of the United States Constitution and the Utah State Constitution.

The trial court's failure to give a jury instruction cautioning the jury regarding oral admissions was in error. Further, that error prejudiced the Appellant, and mandates, that the Appellant's conviction be reversed and remanded to the trial court to afford him a new trial.

RESPECTFULLY SUBMITTED this 21st day of May, 1997.

Kent E. Snider
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed, postage prepaid, two true and correct copies of the above and foregoing Brief to the following:

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DATED this 21st day of May, 1997.

Kent E. Snider
Attorney for Appellant

ADDENDUM "A"

(TRIAL VOLUME I)

A. Had bandanas around their face and a stocking cap, and that's pretty much just how he was dressed.
Q. Okay. Could you tell what race that person was?
A. I thought he was black when I saw him.
Q. Okay. Once you -- when he says, "get to the back," is there only one way to get to the back?
A. Yes.
Q. All right. Did you go there?
A. Uh huh.
Q. And did you come in contact with another individual who was not an employee?
A. Yes, I did.
Q. And did that person have a gun?
A. Yes.
Q. What kind of gun was it?
A. It was like a handgun.
Q. All right. It was different than, in fact --
A. Yes.
Q. -- the other one; is that right?
A. Yes, it was.
Q. And what happened once you got back in the area where that person was?
A. He told me to go to the office and kind of waved the gun towards that way.
Q. Okay.

south side of the building?
A. Yes.
Q. What -- what happened or what was said that gave you reason to believe that there was an armed robbery happening?
A. They came -- men came in with guns.
Q. Okay.
A. And told us to get to the back.
Q. How many men?
A. Two.
Q. And when you say they came in, do you know how they came in?
A. I believe it was through the west entrance, the rear door.
Q. All right. Is that normally an employee entrance or a delivery entrance?
A. Yeah. It was only opened to take out the garbage. The boys were taking out the garbage.
Q. And do you recall approximately what time that would have happened when you first find out that there is an armed robbery, when these men had come into the area?
A. Around -- it was around 11:45.
Q. Describe specifically as you can recall what you saw and what you heard once the men came in. What

did the person or persons say. Let's start with did -- did one person come to the area where you were or did both of them? The two men that you didn't recognize or the two robbers.

A. It was just one person that came forward up to the drive-through register.

Q. All right. And what -- what did that person appear to you like? Could you tell that it was a man?

A. Yes.

Q. All right. And could you tell approximately how tall that person was?

A. Yeah. I can't remember right now though.

Q. All right. Did you give a statement shortly after this?

A. Yes.

Q. And give estimates as to height, weight, and those kinds of thing?

A. Yes.

Q. All right. Could you tell what the -- this particular man's race was?

A. He was African-American.

Q. Okay. Did that person have a gun or a firearm?

A. Yes.

Q. What did that gun look like?

A. A rifle-type of gun, light brown in color.
Q. And about how far away were you from that person when you could see that they had a rifle that was light brown in color?
A. You mean when he first came in?
Q. Yes.
A. Probably about five feet.
Q. Okay.
A. At the most.
Q. Okay. A little closer than perhaps you and I are?
A. Yeah.
Q. All right. And was there anything that blocked or inhibited your ability to look at him as you're looking at me? Was there anything between the two of you?
A. Un uh.
Q. What did that person say when they came into that location with the gun in their hands?
A. They told everything -- he told everybody to get to the back, and kept on -- he was using vulgar language. And so everybody started filing back, and he told me to come and open the cash register.
Q. And what did you tell him or what did you do in response to him wanting you to come and open the cash

have a gun?
A. Yes.
Q. And what kind of gun was that, if you know?
A. A handgun.
Q. Did you go back out to the area and attempt to get the cash register or the cash drawer for the first person you dealt with?
A. No.
Q. Did some other employee go out there?
A. Yes. I went back and told them that they needed to send someone up to open up the registers, and Eric, the other manager that was working there, went and --
Q. Then what did you do?
A. I went back with the other employees and got down on the floor.
Q. Okay. Facedown on the floor?
A. No. Just crunched up in little balls.
Q. Okay. Crunched up in a little ball?
A. (Nods head up and down.)
Q. And where was that happening?
A. It was in the place where there is a sink and the manager's office.
Q. All right. So that was near where the manager's office that Mandy would have been in; is that right?

Q. Do you recall whether or not -- were you, in fact, working on the 16th of June?
A. Yes, I was.
Q. And do you recall what shift you were on?
A. Yes. I worked the graveyard shift.
Q. What time does that start?
A. At 9:00 p.m.
Q. And ends?
A. 7:00 a.m.
Q. Did you, in fact, Officer Felter, receive a dispatch just prior to midnight on the 16th of June of 1995 of a robbery that just occurred at Wendy's on 12th and Washington?
A. Yes, I did.
Q. Is that within Ogden City jurisdictional limits?
A. Yes, it is.
Q. Where were you at when the call came in?
A. I was right close to 12th and Washington.
Q. How long after the -- receiving the dispatch were you able to -- how much time did it take before you arrived at Wendy's?
A. Probably less than 30 seconds.
Q. Were you alone when you arrived initially?
A. Yes, I was.
Q. And did other police officers arrive after that?

Force in Salt Lake City.
Q. And how long have you been in that assignment?
A. Since May of 1995.
Q. What education do you have, please?
A. I have a four-year undergraduate degree, a BA, and I also have a law degree.
Q. When and where did you receive those?
A. I received the undergraduate degree from Youngstown State University in Ohio, and the law degree from Case Western Reserve University in Cleveland, Ohio.
Q. You indicate you've been with the FBI for approximately the past 10 years?
A. That's correct.
Q. When were you assigned in the Salt Lake office?
A. In May of 1995.
Q. Were you given a specific assignment shortly thereafter being assigned to Salt Lake in June of 1995?
A. Yes, I was.
Q. What was that assignment?
A. I was assigned to an undercover operation as an undercover agent. The operation was in effect in the Ogden and Layton area, targeting the Ogden O.V.G. street gang.

Q. And what -- when you say an operation, what is it that you were trying to do or what was it you were doing?
A. We were trying to make criminal cases against the various members of the O.V.G. street gang for their criminal acts that were being committed in the Ogden area.
Q. And did -- what is it that -- was there something that was actually set up for this operation?
A. Yes, there was. We had an undercover off-site in Layton, Utah, that the various gang members believed was a place of business where we would purchase drugs, guns, stolen property, acting in an undercover capacity.
Q. All right. When you say "acting in an undercover capacity," you would portray yourself to be what?
A. They believed I was a criminal, somebody who wanted to purchase drugs and stolen property.
Q. All right. How long did that operation go on for?
A. It went on until November of 1995.
Q. Calling your attention specifically to June 25th of 1995, were you working in that undercover operation on that date?
A. Yes, I was.

Q. Did you have occasion on the 25th of June of 1995 to meet an individual who identified himself to you as Ed Smith?
A. Yes, I did.
Q. Do you see that person in court?
A. Yes, I do.
Q. Please, identify him.
A. The defendant sitting at the defense table with the white shirt and maroon patterned tie.
Q. All right. To the immediate right of Mr. Gravis, Mr. Gravis being in the dark blue jacket; is that right?
A. That's correct.
Q. Had you met him prior to June 25th of 1995?
A. I had not.
Q. How did he identify himself to you?
A. I knew who he was or what he was supposed to look like, and he identified himself as Ed to me.
Q. Where did you meet him?
A. I met him at our undercover off-site in Layton.
Q. And what was the reason that you were meeting with him this day?
A. Mr. Smith believed that he was meeting with me to assist in a criminal act which he was going to make some money. The actual reason was to gain

A. This is.
Q. Does it appear to be in the same condition today as it was when you purchased it?
A. Yes, it does.
Q. Did it have a clip in it when you purchased it?
A. No, it did not.
Q. So you did not purchase it with ammunition?
A. No.
Q. All right. Other than checking it and making sure it's unloaded, has it been changed or altered in any way?
A. No, it has not.
Q. And where has it been stored since being purchased in June of 1995?
A. In a FBI evidence locker.
Q. Thank you. That evidence locker is located where?
A. In the FBI building in Salt Lake City, Utah.
Q. What did the defendant tell you -- I believe your testimony was something -- his response to your talking about it was that that job really sucked; is that right?
A. That's correct.
Q. What -- after that statement, what did the defendant tell you, specifically, about the Wendy's

robbery that he had done?
A. He told me that he and Shane Searle had, on a Friday night at about 11:45 p.m., went into the Wendy's; that he, the defendant, was carrying an SKS rifle; that Shane Searle was carrying a nine-millimeter handgun. That they went into the Wendy's; that the defendant shouted: Yo, this is a robbery, let's not make it a murder. That he ordered everybody to the back of the store; that he cleared the registers while Shane Searle held a nine-millimeter to the head of the girl who was made to open the safe and put the money into a bag.
That during the robbery, one of the employees escaped and ran next door to a motel to try and use the telephone to call the police. And that they -- when they exited, they found out later on that they did not get as much money as they should have.
Q. Were you aware of any of those specific facts before the defendant told you about them?
A. Other than that the Wendy's had been robbed, no, I was not.
Q. How much money did he claim that he got?
A. He told me he got about four or $500.
Q. And did he indicate to you whether or not Mr. Searle's brother was involved in some way?

A. Yes. He told me that Shane Searle's brother, Ran Searle, was an employee at the Wendy's and that he provided them information necessary to perform the robbery.
Q. Okay. During the course of your traveling between Layton and Salt Lake City and having this conversation, did you have some type of recording or listening device activated and operating?
A. Yes, I did.
Q. What did you have?
A. I had a body recorder, we call it, because it's a recorder that we wear on our bodies, and it was secreted in my boot.
Q. Did it record for the entire time that the two of you were together?
A. Yes, it did.
Q. And have you had an opportunity to take the tape recording that was made from that and listen to it?
A. Yes, I have.
Q. Does it accurately record your conversations?
A. Yes, it did.
Q. What is the quality of that tape?
A. Average to below average. It's not real clear, but you can hear the conversation.
Q. Okay. In fact, when you say secreted in your

that you were present with Detective Minor on the 5th of December of 1995. Do you recall that?
A. Yes, I do.
Q. That you were present for the conversations between the defendant and Detective Minor. Do you recall that?
A. Yes, I do.
Q. I did not specifically ask you what the defendant said at that point. Do you recall that?
A. Yes.
Q. Mr. Gravis, in crossing Detective Minor, referred to the statement that was taken as an alleged conversation. Did a conversation take place between the defendant, Ed Smith, and Detective Minor?
A. It certainly did, yes.
Q. Did the defendant confess to Detective Minor?
A. Yes, he did.
Q. Did you remain there for whatever the time period was of the conversation between the defendant and Detective Minor?
A. Yes, I was there for the entire period.
Q. Were there periods of time where in response to probing for specifics that the defendant would reply something?
A. Yes.

Q. What would he reply?
A. A lot of times he would just reply yes or yeah or affirmative-type responses, but without giving details.
Q. Okay. Did he ever indicate, while you were there, that he couldn't remember things?
A. Yeah. He said something about smoking a lot of marijuana and it affected his memory.
Q. All right. In response to that, would you do something? In response to his saying --
A. Oh.
Q. -- I don't remember?
A. Yeah. I was -- I was trying to prod his memory. I was giving him details that he had told me. I said: Don't you remember telling me that, you know, this happened at Wendy's or that happened at Wendy's?
Q. What would his responses be to that?
A. He'd say, yes, and sort of just leave it at that. He wouldn't elaborate or give me any more details.
Q. At any time while this defendant was talking to Detective Minor in your presence, or talking with you, did the defendant ever deny that he did the robbery at Wendy's?
A. No, he hasn't.
Q. With Shane Searle?

A. He never denied it.
Q. Did he ever indicate to you or to Detective Minor that his prior conversation with you was puffing or bragging or anything like that?
A. No, he never said anything to that effect.
Q. Did he ever name anyone else as the person who had committed it?
A. Yes, he did.
Q. Who?
A. He said himself and Shane Searle, and that Ran Searle helped plan it.
Q. All right. Other than that, did he name anyone else?
A. No, he did not.

MR. HEWARD: Thank you. That's all.

CROSS-EXAMINATION

BY MR. GRAVIS:
Q. Was this alleged conversation recorded?
A. No, it was not.
Q. And why not, if you know?
A. Our -- the FBI policy is we never record any types of interviews or confessions of that type.
Q. Why is that the policy of the FBI?
A. I really couldn't tell you. It's just from day one we've been trained --

Q. So it boils down to if the defendant denies that a conversation occurred, it's your word against his?
A. I don't think that's what it boils down to. We just tell what he said.
Q. Okay. But there was no written statement taken from him?
A. No, there was not.
Q. And did you ask -- did you or Detective Minor ask him to give a written statement?
A. No, we did not.
Q. Okay. So -- but there was no recording, no writing, no nothing to verify this conversation took place, outside of your and Detective Minor's testimony?
A. That's correct.
Q. Okay.

MR. GRAVIS: Nothing further.

REDIRECT EXAMINATION

BY MR. HEWARD:
Q. Except your word and Detective Minor's word?
A. That's what it boils down to.

MR. HEWARD: Thank you

THE COURT: You may step down.

AGENT EVANS: Thank you, sir.

MR. HEWARD: Could I just have a

ADDENDUM "B"

(TRIAL VOLUME II)

Facts. Facts that support one and only one verdict, guilty as charged, aggravated robbery.

THE COURT: Would you swear the bailiff, please?

(WHEREUPON, the bailiff is sworn and acknowledges.)

THE COURT: Okay, folks.

(WHEREUPON, at this time the jury leaves the courtroom.)

THE COURT: Do you want to make a record now on the objections to the jury instructions?

MR. GRAVIS: Yes, Your Honor.

THE COURT: Go right ahead.

MR. GRAVIS: I didn't go through the numbers with you, so I don't recall the numbers. A couple of them I do have.

Well, I'll make a record of -- of the one dealing with the defendant's admission or confession.

THE COURT: Right.

MR. GRAVIS: And I'd specifically requested that the last sentence that the Court struck: Evidence of an oral admission -- or as I indicated in chambers -- oral statement of the defendant should be viewed with caution.

ADDENDUM "C"

(SENTENCING)

THE COURT: Mr. Smith, in order for me to proceed with sentencing on all of the cases, you understand that you'll have to give up your right to delay on the Theft charge and on the Escape and Damaging Jail Property. You understand that you're entitled to have those matters stayed at least 48 hours, and no longer than 45 days. Usually, that's for the purpose of getting a presentence report. But you understand, if you want me to proceed on sentencing on those today, you'll have to waive that time.

MR. SMITH: Yes, Your Honor.

THE COURT: Is that what you want to do?

MR. SMITH: That's what I want to do.

THE COURT: All right. You may proceed then.

MR. GRAVIS: Yes, Your Honor. As far as the multiple cases, they just address the aggravated robbery recommendation. There is a recommendation for five to life which, I guess since Mr. Smith is already in prison, I don't have a whole lot to say about that, except they're recommending it consecutive to the zero to five.

Mr. Smith, prior to this aggravated robbery, has, I believe, six or seven misdemeanor convictions, no prior felonies. The felony he's presently serving time on out of Davis County actually occurred after the robbery, but it was resolved prior to the robbery charge simply because, as the Court is well aware, Mr. Smith changed attorneys a few times and things like that that caused some problems and delayed this case in getting resolved first.

So we'd submit that the -- the recommendation that this five to life run consecutive to the zero to five he's already serving is inappropriate, just that -- but for the way things happened, Mr. Smith would have been sentenced on this one first. I don't see any indication whether the Court down in Davis County had recommended there that they didn't want anything to run concurrent with their sentence.

So, first off, we'd ask the Court not to sentence him consecutive to the zero to five he's already serving.

More importantly, on the issue of the dangerous weapon enhancement, which we -- we filed an objection to the dangerous weapon enhancement being imposed in this case and the State responded by way of memorandum. It's our position that the statute,

as amended in April of 1995, where the language was changed making it an enhancement for -- changed it from firearm to a dangerous weapon in the enhancement statute, is it's simply a repetition of the aggravating factor which made this a first degree aggravated robbery from a robbery charge, and that is double jeopardy.

Aggravated robbery, as defined in what Mr. Smith was convicted of, was he committed a robbery and used a dangerous weapon. So that's what he was convicted of is committing a robbery with a dangerous weapon, making it an Aggravated Robbery, First Degree Felony, rather than a second degree. And then to impose the further enhancement for Use of a Dangerous Weapon, I submit it's being punished twice for the same act, using a dangerous weapon in the commission of a robbery; and, therefore, it is our position that constitutes double jeopardy.

Now, prior to the amendment, the Utah Supreme Court and the Court of Appeals had ruled that the firearm enhancement did not constitute double jeopardy, and in my memorandum I specifically cited some language from the State versus Webb case where they indicated that the legislature could find the use of a firearm, or facsimile, was a more ominous

threat than the use of any -- a different -- other type of dangerous weapons; and, therefore, that's why it was not double jeopardy because it was firearm as differentiated from other types of dangerous weapons.

But the language changed in April of 1995 -- that went into effect in April of 1995, they redid to both an aggravated robbery and the enhancement; therefore, it's being twice punished for the same -- same act, that's using a dangerous weapon in a robbery.

THE COURT: Okay.

MR. HEWARD: Your Honor, I'll address the issues in the -- essentially the same order as Mr. Gravis did.

We do not have an objection to Mr. Smith being sentenced on the offenses that he's pled into today; however, there is restitution on each of those. I have an itemized listing of the restitution on the destruction of jail property that certainly Mr. Gravis and Mr. Smith can have a copy. It gives a breakdown, as well as the total. The total amount in order to repair and replace the items that he damaged is $1,169 even. That breaks out in both labor and materials at approximately $760 in labor and the remainder in materials.

On the issue on the stolen vehicle on Mr. Daines' case, I -- I cannot give the Court an exact total. There are some forms that have been attached -- that have been attached from Clarence and Kathy Jones, which were the owners of the 1991 Nissan Pathfinder. It appears that the vehicle that was stolen was insured through Farmer's Insurance Exchange, and they have listed an itemized attachment for not only the vehicle, but all of the items that were -- is this the stuff that was in it or the stuff that was taken in the burglary of the home?

(Off-the-record discussion.)

MR. HEWARD: Maybe the best thing would be to do, Your Honor, in talking to Mr. Daines, who had that case, is just ask you to leave restitution open and we will attempt to -- rather than -- with there not being a presentence report, if we could have about 30 or 45 days, we'll come up with a figure, submit that to Mr. Gravis, submit that to the Court, or you can leave it to the Board of Pardons, whichever you prefer.

MR. GRAVIS: Your Honor, maybe we can -- Mr. Smith has indicated he wants a restitution hearing on -- on the one matter.

MR. HEWARD: On the jail matter?

MR. GRAVIS: So we could set that for the same time.

MR. HEWARD: That's fine.

MR. DAINES: That's even better.

THE COURT: Okay.

MR. HEWARD: Okay. On the issues, Your Honor, Mr. Gravis filed a brief and we responded, and I will assume that the Court had the benefit of our response and will not necessarily go back over each and every item. However, as we did line out for Your Honor, the specific issue that Mr. Gravis raises today has been previously raised, has been previously briefed from both sides, only when there is a little different language, when the language was firearm in the robbery or agg robbery statute, and firearm in the penalty enhancement section. While Mr. Gravis claims that this is different now by using -- going to a dangerous weapon, he doesn't tell the Court how it's different, or how the analysis that the Court follows is any different.

In the three cases that are cited, the Drawn decision, the Webb decision, and the Russell decision, these exact same arguments are raised and they are all handled in the exact same way. The

Court comes back and says: This is not double jeopardy. This is nothing other than a penalty enhancement.

The legislature has determined that we are going to punish all felons who use a firearm in -- in the three decisions. The only thing the legislature did when they changed that language is broadened the class. The analysis is no different. They simply looked at it, in my opinion, from the State's opinion, and simply said: We are not going to simply limit the penalty enhancement to just those who use firearms because someone who is threatened with a knife or who is threatened with another weapon is just in the similar or same position where they are being exposed to more danger, where people who go out and commit the crimes and who are armed with dangerous weapons are, in fact, creating a likelihood of a much more serious situation happening.

Simply look at that and it's interesting, if you read the three decisions, pre-1975, the statute talked about dangerous weapons for purposes of the agg robbery. In '75, they changed to firearms, and then in '95, they went back to dangerous weapons. I'm not exactly sure why the legislature vacillates between one or the other.

But the bottom line is this is not a situation where Mr. Smith is being twice put in jeopardy for the same offense. The statutes -- I'm sorry, the cases are very, very specific in addressing that issue and saying, the legislature has simply determined that we are going to punish people more severely when they fall into this particular class, which the defendant clearly does. The jury clearly returned the verdict indicating he had used a firearm.

The fact of the matter is is that the legislature gives Your Honor some additional direction in that they want those sentences -- enhancements to be consecutive, and not concurrent, and gives you discretion in determining whether or not that would be for one year or for an additional zero to five.

Based upon all those reasons, Your Honor, as set out in our memorandum, it is our position that the change does not change anything that has previously been argued in both the Utah Supreme Court and the Utah Court of Appeals, nor is there anything lined out in the defense's brief that would indicate that that is the case.

It is our position, therefore, obviously, that

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It is our position, therefore, obviously, that

Your Honor should, and the law allows that, in fact, there be a penalty enhancement for his use of the firearm.

On the issue, specifically, on what this defendant's sentence should be, it is the State's position that his Aggravated Robbery conviction should, in fact, be a consecutive sentence. And the primary reason for that, Your Honor, is that this defendant has shown an incredible pattern of conduct over a period of time. Mr. Gravis says he only has misdemeanors. If you look at what those misdemeanors are, they are aggravated assaults that were amended down; they were carrying concealed weapons. They were situations like that where the defendant is showing you a propensity for violence.

Beyond that, when he is out there and committing the agg robbery -- that the jury clearly found that he did -- he chose to interject himself into a public restaurant with an assault weapon in his hands and start ordering and threatening people in such a situation, or in such a manner, that those type of crimes mandate the very toughest sentence that the courts can impose.

Beyond that, there's an additional factor that I think the Court needs to be aware of. Calling your

attention back to the testimony of Special Agent Bob Evans -- Mr. Gravis has a copy of this and it wasn't something that was testified to because for purposes of the determination of guilt or innocence, it is not something that was relevant.

During the course of this defendant talking to Mr. Evans and being tape-recorded about how he had committed this crime, he also starts talking about other individuals that he is upset at, specifically, an individual who shot him, and how when that individual gets out of jail or out of prison, how he is, in fact, going to get him. How is he, in fact, taking this fact that he has been shot very personal and that he is going to return the favor, if you will, and impose upon him the same thing that this defendant indicates that he did to the defendant.

The bottom line is, Your Honor, is that this is an individual who I'm not sure ever is going to be in a position where -- where the State believes that he's ever going to be in a position where he should ever be outside of the walls of the Utah State Prison. He has gang affiliations, he shows a propensity for violence. He commits the most serious crimes you can commit, and his history indicates that he's done it in the past.

For all of those reasons, it would be our position that his five to life should run consecutive to everything else that he is doing, and that it will be Your Honor's determination of whether or not the additional penalty would be for one year or for a zero to five.

MR. GRAVIS: Your Honor, may I approach the bench and borrow one of the your Codes?

THE COURT: Sure.

(Off-the-record discussion.)

MR. GRAVIS: First off, in response to Mr. Heward, Mr. -- he incorrectly stated Mr. Smith's prior record. It shows no aggravated assaults being reduced to class A misdemeanors. He's never been charged with an aggravated assault and had it reduced. He's never been charged with aggravated assault.

He was charged with two previous felonies, but neither one of them were aggravated assaults. They were both dismissed.

So -- and let me find the section.

(Mr. Gravis looks at Utah Code.)

MR. GRAVIS: Your Honor, Mr. Heward indicates that the aggravated robbery was amended in 1995 to change the language. It was amended -- the

statute, as it currently reads, was amended in 1994. It says, use of a dangerous weapon. And I can't recall -- and I don't have the cases here. I was looking through them when I cited them. I believe it said dangerous weapon back when these other cases were decided. I don't think that language has been changed.

But clearly, since 1995, the enhancement statute was changed from firearm to use of a dangerous weapon, and I submit that it's our position that that is a difference, that the robbery statute said: use of a dangerous weapon makes it an aggravated robbery. I believe that's the case where it's always been that way for several years.

But the use of a firearm -- the changing from the use of a firearm to use of a dangerous weapon in April of 1995 is a significant change since those cases have been decided because the language is the same: Uses a dangerous weapon in a robbery, because an aggravated robbery -- the enhancement is another enhancement for use of a dangerous weapon. Doesn't matter whether it's a gun, knife or whatever in the new statute, where in the old statute, it's a firearm.

So we submit that it's inappropriate.

THE COURT: Well, let me ask -- just one concern, Mr. Gravis. Assuming, you know, the correctness of your position and -- for the purpose of the argument, anyway -- in this case it was a firearm. And are you really in a position where you can take advantage of more general language?

MR. GRAVIS: I think so, yes, Your Honor, because it's more general language. They changed the law. It's not -- if they wanted to leave it a firearm, they could have left it that way. When they changed it to all dangerous weapons as an enhancement, then they're all classified together. It doesn't matter whether it's a firearm or a baseball bat. They're all enhancements. The use of any of them brings in the enhancements. The use of them also makes them a robbery and aggravated robbery.

I would submit though probably the legislature didn't consider that. They don't consider a lot of things when they pass -- change statutes. And they may want to change it back, but as it states right now, I'd submit that the law cannot -- you cannot impose the dangerous weapon enhancement when you've already aggravated it from a second degree to a first degree because of the use of a dangerous weapon.

MR. HEWARD: What that ignores, Your Honor, is that when the statutes were challenged in the three cases, the language on the penalty enhancement said "firearm," and the language in the robbery statute said "firearm." Now the language in the robbery statute says "dangerous weapon," and the language in the penalty enhancement says "dangerous weapon."

THE COURT: I see your point. Oh, okay.

MR. HEWARD: So there is no difference. They changed -- there's changes in both of the applicable statute.

In regards to Mr. Gravis' saying I misstated it, I do apologize. I said "aggravated assault." The defendant wasn't charged with aggravated assault. He was charged with attempted homicide. I apologize for that. That was in 8-20 of 1993, and it appears by guilty plea, he was convicted of threatening with a weapon, a Misdemeanor, Class A, but he was charged with attempted homicide.

Also, specifically, Your Honor --

MR. GRAVIS: Your Honor, I'm going to object. Mr. Heward is reading things that are not included in the presentence report. If he's

interjecting something that I haven't seen, I would like a chance to look at it.

MR. HEWARD: I am reading off of the OR sheet and the attached Utah Criminal History Record, which Mr. Gravis had a copy of because it was provided in anticipation of trial. It was something that was provided to him as far as discovery goes.

MR. GRAVIS: I would have had that, yes, I agree. I was going off the presentence report.

MR. HEWARD: As to the other things that I cited to, in June of '93 there was another concealed weapon offense that was amended to a threatening with a weapon, and there was an additional -- there was a riot arrest in 1994 that there was -- does not show a judicial outcome on.

Then there was interfering with arrest, possession of a deadly weapon, felony, again in 1994, where the charge appears to have been dismissed, at least on the possession charge. It doesn't show -- there may have been a conviction. I can't tell. There was. There was a conviction of carrying a concealed weapon in 1994.

And then there was the obstruction of police, Misdemeanor B, that the defendant was also convicted

of in 1994; and then a couple of other arrests in '95 that it does not show the judicial outcome on.

THE COURT: Okay.

MR. HEWARD: I misspoke. It was attempted homicide, not aggravated assault.

THE COURT: Anything further, Mr. Gravis? You should have the last word.

MR. GRAVIS: Well, Your Honor, I would state that I don't believe that the statute was changed -- the language. It certainly wasn't changed in 1995, as Mr. Heward has indicated, to the use of a dangerous weapon. And I believe the language at the time of these other cases was the same as it is now; therefore, there is a difference.

THE COURT: Okay. If I understand correctly the present provision, the Court has the option of -- well, obviously, the five to life, which is the statutory penalty. And if I proceed with the firearm enhancement -- the dangerous weapon enhancement at this point -- that I can either impose a one-year, minimum mandatory, in essence, consecutive, or a zero to five.

MR. HEWARD: Correct.

THE COURT: In the alternative.

MR. HEWARD: That's correct.

MR. GRAVIS: That's correct, Your Honor.

MR. HEWARD: The statute doesn't read that clearly, but I believe that's what the cases have told us.

THE COURT: As a matter of fact, the Supreme Court in my case told me.

MR. HEWARD: Yes, I think so.

THE COURT: And they made that sufficiently clear in the other aggravated robbery situation we have coming back.

MR. HEWARD: Yeah.

THE COURT: All right. Mr. Smith, on the charge of Aggravated Robbery, it's the order of the Court that you be committed to prison for a period of not less than five years and may be for as much as life. The Court is, in addition, going to impose a consecutive zero to five years as a firearm enhancement -- or deadly weapon enhancement.

The Court believing that I have achieved, basically, with that what I'd need to achieve, has no objection with that sentence running concurrently with the previous zero to five out of Davis County. In other words, I think it would be kind of stacking it on to give him a zero to five consecutive on the